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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform	)	CS Docket No. 96-85
Provisions of the Telecommunications	)	
Act of 1996	)	

COMMENTS OF THE NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.

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The New England Cable Television Association, Inc. ("NECTA") submits these Comments in response to the Commission's Notice of Proposed Rulemaking in the above captioned proceeding.[1/] NECTA is a trade association representing cable television operators, including both small systems and national multiple system operators.

INTRODUCTION AND SUMMARY

NECTA's members expect to compete with local exchange carriers ("LECs") and their affiliates in the provision of video services throughout New England. NECTA therefore has a keen interest in the fair implementation of the 1996 Telecommunications Act's new "effective competition" standard that will allow its members the flexibility to

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[1/]In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking, CS Docket No. 96-85, rel. April 9, 1996 ("NPRM").

restructure their rates when faced with competition from LEC-affiliated video services. By eliminating the administrative and cost burdens of the prior notice and approval restrictions of the current rate regulation scheme, rapid and flexible implementation of the new effective competition standard will enable New England cable operators to respond to LEC competition with new programming packages and marketing initiatives. This will ultimately benefit the consumer, as Congress intended.

New England cable operators already face extensive and aggressive competition from LEC-affiliated video competitors, including SNET and NYNEX. This competition is both offensive, to increase their customer pools, and defensive, to undercut the potential competition cable operators pose in telephony.

The FCC should adopt a definition of "affiliate" for purposes of the test that recognizes the vigorous, active nature of LEC investment in cable operators. The FCC should clarify that passive equity interest and de facto control can constitute affiliation for this purpose. The Commission should also retain its interim standard for purposes of determining whether LEC-affiliated MVPDs are "offering" video programming services under the new effective competition test.

Finally, and perhaps most importantly, NECTA urges the Commission to adopt streamlined procedures for effective competition certification. This will prevent delay in the response of New England and other cable operators to the presence in their markets of a financially well-heeled video competitor.

I. The Commission Should Adopt Rules Implementing The New Effective Competition Test That Carry Out The Intent Of The 1996 Telecommunications Act

A. New England Cable Operators Already Face Extensive And Aggressive LEC Affiliated Video Competitors

NECTA's members face extensive competition from LEC-affiliated wired video providers and wireless cable systems doing business throughout New England. The Southern New England Telephone Company ("SNET"), for instance, through its multichannel video programming subsidiary SNET Personal Vision, earlier this year filed with the Connecticut Department of Public Utility Control an application for a certificate of public convenience and necessity ("CPCN") to provide cable service pursuant to a single, statewide franchise.[2/]

SNET Personal Vision's initial two-year deployment schedule includes portions of ten different franchise areas, with aggressive plans to expand service to all 24 franchise areas in Connecticut.[3/] The company's cable service would be provided through SNET's $4.5 billion "I-SNET" advanced communications network, hybrid fiber-coax ("HFC") network capable of carrying 76 channels, including local channels, pay-per-view services, and other traditional cable products.[4/] SNET Personal Vision also plans to deliver ultra-high-speed Internet access services to subscribers shortly after winning CPCN approval from

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[2/] See Application of SNET Personal Vision, Inc. for a Certificate of Public Convenience and Necessity to Provide Community Antenna Television Service, Docket No. 96-01, Department of Public Utility Control, filed January 25, 1996. See also "SNET Unveils Plan to Create Statewide Cable TV Franchise," Fairfield County Business Journal, February 5, 1996, p. 9.

[3/] Id.

[4/] See "SNET Seeks Connecticut Cable Franchise for Video and Telephony Over Fiber-Coaxial," Common Carrier Week, January 29, 1996.

Connecticut.[5] Moreover, SNET's HFC cable enterprise is not SNET's only video programming service. SNET has committed to continuing its video dialtone service in West Hartford, Connecticut, at least until the HFC network is fully built-out.[6]

New England cable operators also face vigorous competition from wireless cable providers. NYNEX, the LEC that dominates the New England states other than Connecticut, obtained video dialtone authorizations from the FCC in Massachusetts and Rhode Island.[7] NYNEX, however, has postponed activating these wired video delivery services in favor of an interim strategy of competing with cable systems in New England by means of wireless cable.

Bell Atlantic and NYNEX (through their joint venture, "BANX"), in March 1995, invested $100 million in CAI Wireless ("CAI"), a Multichannel Distribution Service ("MDS") provider, with an option to purchase 45% of the company for a total investment of $300 million.[8] CAI swept every major television market in the Northeast Corridor during the FCC wireless cable auction that concluded on March 28, 1996, winning MDS licenses for New York City, Boston, Philadelphia, Washington, D.C., and Baltimore,[9] CAI spent a

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[5] See Common Carrier Week, January 29, 1996.

[6] Id.

[7] See Washington Telecom News, June 19, 1995.

[8] Broadcasting & Cable, May 1, 1995, p. 16.

[9] See Bureau of National Affairs, "Daily Report for Executives," April 1, 1996, Section A. Id. CAI also won licenses in out-of-region cities such as Cleveland, Atlanta, Charlotte and Louisville.

total of $48.8 million on the auctions, with the New York City license bid at $20.2 million.[10]

Today, CAI has operating wireless cable channel rights in Boston, Worcester and Providence and provides 33 channels of service to many other markets in the NYNEX region, including New York City, Rochester and Albany, as well as to markets in the Bell Atlantic region, like Philadelphia, Washington, D.C., and Norfolk/Virginia Beach, VA. CAI has wireless cable systems or wireless channel rights in a total of 17 markets encompassing approximately 12.7 million line-of-sight households in major markets, primarily in the Northeast and Mid-Atlantic states.[11]

Digital compression technology and new state-of-the-art MDS transmitters, will soon enable CAI and similar wireless cable providers to more than double their channel capacities to 80 digital channels and 40 near video on demand channels.[12] Not only does CAI offer traditional cable video products like network programming and pay-per-view services, CAI is also mirroring cable operators' entry into new service areas, such as the provision of ultra-high-speed Internet access.[13]

The new effective competition test is based on Congressional insight that "the provision of video programming services by a telephone company subjects a cable operator

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[10] "FCC Wireless Auction Brings In $216.3 Million," Newsbytes, April 1, 1996.

[11] The Times Union (Albany, NY), April 3, 1996, at B9; see also Broadcasting & Cable, March 11, 1996, p. 80.

[12] "Baby Bells Finance Digitization of Wireless Cable," Video Technology News, April 8, 1996.

[13] See "'Wireless Cable' Firm Plans to Boost Speed of Internet Access," May 30, 1996, p. 16.

to effective competition that will ensure reasonable rates and high quality services more effectively than government micromanagement.[14] New England cable operators thus face an increasingly competitive video marketplace as these LEC-affiliated wireline and wireless services activate their systems and market their products. New England cable operators need the flexibility to restructure their rates and tiers of services to respond. This will serve the public interest, as envisioned by Congress in the 1996 Act.

B. The Commission Should Adopt A Definition Of "Affiliate" For Purposes Of The Test That Recognizes The Vigorous, Active Nature of LEC Investment In Cable Competitors LEC

Given the aggressive nature of LEC investment in video affiliates, the FCC should define the term "affiliate" in a manner that takes into account the true nature of the competitive undertakings of LECs such as those described above. The new fourth prong of the effective competition test provides that effective competition exists if a LEC "or its affiliate" "offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator...."[15] As the FCC notes,[16] the Telecommunications Act of 1996[17] does not alter the existing definition of "affiliate" under Title VI -- the cable television section -- of

[14]House Report at 109.

[15]1996 Telecom Act at § 301(b)(3); 47 U.S. 543(l)(1)(D).

[16]NPRM at ¶¶ 15-16, 74-77.

[17]Pub. L. No. 104-104, 100 Stat. 56, approved February 8, 1996.

the Communications Act.[18/] Instead it adopts a new general definition of "affiliate" under Title I of the Act.[19/] The Commission invites comment on whether it should adopt the new Title I definition of "affiliate" for purposes of the LEC video affiliate effective competition test. NECTA believes it should not.

Instead of applying the Title I "one-size-fits-all" definition of "affiliate" to this prong of its effective competition rules, the Commission should adopt affiliation standards that are sensitive to the motivation of LEC investments in multichannel video programming providers ("MVPDs"). Only then will the FCC rule encompass affiliated relationships between LECs and MVPDs of the kind intended by Congress to trigger a finding of effective competition to a cable operator in the same franchise area.

NECTA urges the Commission, for the specific purposes of this effective competition test, to adopt a low ownership interest threshold -- no more than 5% -- that takes into account both LEC voting and LEC nonvoting equity interests. In addition, the FCC should also look to instances of de facto LEC management and control, as discussed in detail below.

The Commission should adopt a relatively low ownership interest affiliation threshold for purposes of the LEC video affiliate effective competition test because of the record before it of the objectives of NYNEX, SNET and other LECs as they have announced their entry

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[18/]Communications Act § 602(2)("the term 'affiliate,' when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.")

[19/]See 1996 Telecom Act at § 3(a)(2); codified at 47 U.S.C. § 153(1) ("The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.")

into the video services arena. One of the primary purposes of the 1996 Act was to eliminate unnecessary competitive barriers between telephony and video providers, permitting LECs and cable operators to enter each other's businesses.[20/] Congress was well aware of the urgency with which the LECs had pursued entry into video services during the early 1990s, and accommodated most of the LECs' interests in entering this field, while still recognizing their disproportionate market power.[21/]

The 1996 Act removed many of the statutory barriers for LECs to compete with, and acquire, cable, DBS, MMDS and SMATV systems in the video services marketplace. There was a clear Congressional understanding that once these barriers were removed, cable operators and other video competitors would face substantial competition from the expansive resources of the LECs.

Congress recognized appropriately that LECs would constitute particularly robust competitors in the multichannel video programming services market.[22/] Given the financial strength and technological prowess of the telephone companies, Congress reasonably concluded that the mere presence of a telephone company within a cable operator's franchise

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[20/]Telecommunications Act of 1996 Conference Report, Joint Explanatory Statement, S. Rep. 104-230 at 172 (Feb. 1, 1996)("Conference Report").

[21/]Id. at 177-78.

[22/]141 Cong. Rec. § 8243 (daily ed. June 13, 1995) ("Looming large on the fringes of the [video programming services] market are the telephone companies. The telephone companies pose a very highly credible competitive threat because of their specific identities, the technology they are capable of deploying, the technological evolution their networks are undergoing for reasons apart from video distribution, and, last but by no means least, their financial strength and staying power.") (statement of Sen. Pressler).

area, and its ability to rapidly expand its initial foothold given its extensive capital resources, would ensure competitive market rates.[23]

The LECs, moreover, have prioritized entering the video services business not only as an offensive strategy, as a means of expanding their service offerings and increasing their revenues and customer pools, but also as a defensive strategy in competing with cable operators, who present the LECs with perhaps the most serious potential competition in the telephony market, in order to deny cable operators the capital to expand into this field. The LECs fairly can be assumed never to be investing in a video provider in a passive manner for the purpose of maximizing their return on excess funds, as they would in a mutual fund or other passive vehicle.

While cable companies were provided with certain statutory protections in entering the telephony market, Congress acknowledged that this playing field between LECs and cable is tilted in favor of the LECs. On that basis, Congress directed the Commission to promulgate rules that will prevent the LECs from exploiting their monopoly power against cable and other new telephony competitors.[24]

In light of the LECs' loudly proclaimed interests in competing aggressively in the video marketplace, for both offensive and defensive purposes, the Commission must select an affiliation standard in effective competition determinations that will adequately account for

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[23] Cf. 141 Cong. Rec. § 8430 (daily ed. June 15, 1995) (statement of Sen. Burns).

[24] See 141 Cong. Rec. S 7984 (daily ed., June 7, 1995); see also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Local Competition Notice, FCC 96-182 (rel. April 19, 1996)(recognizing the need for the Commission to establish rules governing the entry of competitors into the local telephony marketplace).

LECs' true intent in acquiring MVPD investments. The Title I definition of "affiliate," by its own terms, is a general definition that is applicable "unless the context otherwise requires."[25] The context of LEC entry into the video marketplace merits a specially-tailored definition of "affiliate."

Given the LECs' admitted adoption of entry into the video services market as an important affirmative business strategy, a low threshold for an affiliation standard should be used for purposes of the effective competition test. The proper test would count any active or passive LEC ownership interest of 5% or more in an MVPD provider as well as other indicia of de facto control that demonstrate a LEC's ability and intent to mount a serious challenge to the cable operator in the market. Congress intended for the cable operator, at this point, to be able to take steps to restructure its rates to meet this challenge.

C. The Commission Should Clarify That Passive Equity Interests And De Facto Control Can Constitute Affiliation For Purposes Of The New Effective Competition Test

The Commission should clarify that a LEC's passive equity interests in, and de facto control of, a video competitor can constitute affiliation for purposes of the effective competition test. Designating as affiliates only those companies in which a LEC has a 5 percent voting equity interest would exclude many entities that LECs are in fact directing in their confrontation with cable operators. The Commission's rules implementing a new LEC/MVPD affiliation test, therefore, must address situations in which there is clear LEC intent to act aggressively to support an MVPD competitor.

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[25] Section 3 of the Communications Act, 47 U.S.C. § 153.

The NYNEX/Bell Atlantic BANX venture that invested $100 million in CAI Wireless (with options for a 45% ownership interest in the company, for a total of $300 million in investment) is the kind of LEC MVPD affiliation arrangement that the Commission's definition of "affiliate" must encompass in order for New England and other cable operators to achieve deserved deregulation where they are faced with effective competition. NYNEX and Bell Atlantic's investment in CAI does not constitute an outright purchase, but was crafted as a "business relationship agreement" under which Bell Atlantic and NYNEX have the right to exercise a five-year option on a market-by-market basis to take over CAI Wireless' operations and essentially lease each system from it.[26/] After the five-year agreement term (which can be extended by two years), Bell Atlantic and NYNEX can take customers with them to their own networks and give CAI Wireless back its facilities.

The Commission's interim affiliation rule defines "affiliate" to mean an entity in which a telephone company has more than a 10% active <u>or passive</u> equity interest or its equivalent.[27/] The Commission has not defined what constitutes the "equivalent" of an equity interest, but has stated that it will have the discretion to establish an ownership interest

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[26/]<u>See</u> "Bell Atlantic and NYNEX Invest $30 Million in CAI Wireless; In Start of Closing of $100 Million Financing," M2 Presswire, May 12, 1995; 'Bell Atlantic and NYNEX Invest $30 Million in CAI Wireless; In First Stage Closing of $100 Million Financing," Edge, May 15, 1995.

[27/]<u>See</u> NPRM at ¶¶15-16 ("The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent)."

other than 10% for purposes of effective competition findings on a case-by-case basis, taking under account any evidence of de facto control.[28]

In order to prevent LECs from using a subterfuge such as the BANX investment to establish a relationship that is de facto affiliation in order to avoid triggering the effective competition exemption, the Commission must define the term "affiliate" in such a way that would encompass the existence of any contingent interest or "business relationship agreements" like the NYNEX and Bell Atlantic BANX joint venture investment in CAI.

In making such a determination, the FCC should be guided by such indicia as the de facto control criteria it established in Intermountain Microwave,[29] where the Commission determined that de facto control is present where any one of the following factors points to the outside party (in this case, the LEC):

(1) Who has unfettered use of all facilities?

(2) Who controls daily operations?

(3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

(4) Who is in charge of employment, supervision, and dismissal of personnel?

(5) Who is in charge of payment of financing obligations, including expenses arising out of operation?

(6) Who receives monies and profits from operation of facilities?[30]

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[28] NPRM at ¶ 16.

[29] 24 Rad.Reg. (P&F) 983, 984 (1963).

[30] Id.; see also In re Application of Ellis Thompson Corporation For Facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134, Atlantic City, New Jersey, 10 FCC Rcd 12554, 12556 (rel. Nov. 20, 1995).

Absent such clarification, a LEC with de facto control over an affiliate by virtue of a management or marketing agreement or other similar arrangement would be able to subvert the objectives of the 1996 Act by prolonging the constraints of rate regulation on the cable operators it faces.

The Commission should also clarify that the affiliation standard can be met both by investments by a single LEC and by the aggregated interests of several LECs. The fact that two or more LECs as opposed to a single LEC are affiliated with an MVPD should be irrelevant. What is relevant is that the MVPD entity is sufficiently related to a LEC or LECs to make it a competitive presence in the service area of a cable operator.

II. The FCC Should Retain Its Interim Standard For Purposes Of Determining Whether LEC-Affiliated MVPDs Are "Offering" Video Programming Services Under The New Effective Competition Test

Congress made clear in the Conference Report to the 1996 Act that for purposes of the new effective competition test, the term "offer" has the same meaning given the term in the Commission's rules as in effect on the date of enactment of the bill."[31/] Under the existing FCC definition of "offer," an MVPD service would be deemed offered when the provider "is physically able to deliver service to potential subscribers," and "when no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the [MVPD]."[32/]

[31/] 1996 Telecom Act, S. Rep. 104-230 at 170 (Feb. 1, 1996).

[32/] 47 C.F.R. § 76.905(e).

Given the clarity of the Congress' instruction regarding the interpretation of the term "offer" in the new effective competition test, the Commission's request for comments concerning whether it should modify the existing definition to include a numerical pass rate requirement for use in applying the new fourth prong of the effective competition test[33/] unnecessary, and at odds with the intent of Congress in the 1996 Act.[34/]

Moreover, the fact that Congress did not implement a numerical pass or penetration rate requirement in the telco video affiliate prong of the effective competition test comports with the special nature of LEC entry into video programming. Congress assessed correctly that LECs would compete aggressively and with weighty competitive arsenals whenever they entered a franchise area.

Instead of adopting an addition numerical pass or penetration rate, the Commission should adopt its existing definition of "offer," without modification, for purposes of the effective competition test. Thus, in determining whether an LEC-affiliated MVPD service is

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[33/]See NPRM at ¶ 72 ("We seek comment as to whether Congress intended effective competition to be found if a LEC's, or its affiliate's, service was offered to subscribers in any portion of the franchise area, or whether the competitor's service must be offered to some larger portion of the franchise area to constitute effective competition.")

[34/]To quote Commissioner Chong:

> In adopting the effective competition test without a specific pass or penetration rate, Congress made its intention clear that this fourth effective competition test would be made if the LEC offered service in any portion of the franchise area. If Congress had intended a higher standard, ... it would have specified a pass or penetration rate as it did in the other three effective competition tests. NPRM, Separate Statement of Rachelle B. Chong at 2.

See also Separate Statement of Commissioner James H. Quello at 1.

"offered" in a cable system's franchise area, the Commission should assess on a case by case basis the cable operator's showing to determine whether it demonstrates that such a service is in fact marketed to potential subscribers in the franchise area, whether subscribers are in fact aware of such service, and whether the MVPD provider is actually capable of providing the service to subscribers in the franchise area.

For determining the "offering" of service by an MMDS operator, the Commission was correct in establishing the 35-mile noninterference zone as the presumptive service area for purposes of effective competition certifications.[35/] The Commission should clarify, however, that a cable operator may demonstrate that an MMDS system provides effective competition beyond its presumptive signal delivery zone. The Commission could require that, for purposes of such a showing, cable operators submit to the Commission information concerning the geographic scope of the MMDS operator's marketing efforts, technical signal strength information, or other data establishing that the MMDS operator can and does offer service to homes outside of the 35-mile zone.

III. The Commission Should Adopt Streamlined Procedures for Effective Competition Certification

Not only must the Commission apply a definition of "effective competition" that recognizes the aggressive and stealthy competitive activities of LECs and their affiliates, it must also adopt streamlined procedural guidelines for the submission and resolution of effective competition certifications to ensure that cable operators facing effective competition are deregulated soon after submitting such a showing. Such a requirement would be

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[35/] NPRM at ¶ 10.

consistent with the 1996 Act, which emphasizes the need for rate structure flexibility by cable operators facing LEC video competition by providing that all cable systems meeting the relevant criteria under the new effective competition test are exempt from rate regulation immediately upon enactment of the Act.[36/]

The Commission should require that certifications of effective competition to be resolved, by the Commission itself or on delegated authority by the Cable Services Bureau, within 90 days of their submission. Such a 90-day review period is reasonable and consistent with other FCC cable review limitations, such as the newly-enacted 90-day review limitation on rate complaints.[37/] If the Commission were resolve rate complaints in 90 days, but place no time limit on the review of an effective competition certification, this would create an incongruous situation. Operators facing competition and seeking deregulation likely would receive the imprimatur of the Commission as to the legitimacy of their deregulated status sooner by restructuring rates and causing a rate complaint to be filed with the Commission than by forebearing and proceeding through an effective competition certification.

Alternatively, the Commission should consider adopting an "automatic approval" certification mechanism for purposes of the new effective competition test, similar to the one implemented by the Commission in its 1993 Report and Order with respect to local

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[36/]47 U.S.C. § 543(a)(2); see also NPRM at ¶ 17 ("A cable system that meets all of the relevant criteria in the new effective competition test is exempt from rate regulation as of February 8, 1996, the date the 1996 Act was enacted.")

[37/]Telecom Act, § 301(b)(1)(C), 47 U.S.C. § 543(c)(3).

franchising authority ("LFA") review of cable operator rate justifications.[38] To justify rates under the Commission's benchmark ratesetting mechanism, a cable operator submits the appropriate completed justification form with the LFA. If the LFA does not act upon the rate justification with 30 days of its submission, the rates are presumed reasonable and are deemed approved.[39] This automatic approval procedure ensures that a cable operator is not denied the ability to raise its rates by virtue of the inaction, inattention or other delays caused by the LFA.

An automatic approval mechanism for processing effective competition certifications should provide that a cable operator's effective competition certification is deemed approved no later than 45 days following its filing, absent any Commission action tolling the review period or a grant of the certification conditioned upon a reasonable refund liability period. Such a mechanism would ensure the prompt deregulation of cable systems facing effective competition, while preserving the interests of subscribers by permitting the Commission or an LFA to challenge the effective competition certification either during the initial review period or in a tolling period within which the cable operator can be found subject to refund liability.

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[38] In the Matter of Implementation of Sections of the Cable Television Consumer protection and Competition Act of 1992; Rate Regulation; Report and Order and Further Notice of Proposed Rulemaking; 8 FCC Rcd 5631, 5709-10 (¶¶ 118-120).

[39] Id. at ¶ 118.

CONCLUSION

For the foregoing reasons, the Commission should adopt a definition of "affiliate" for purposes of the test that recognizes the vigorous, active nature of LEC investment in cable operators. In this regard, the Commission should clarify that passive equity interest and de facto control can constitute affiliation for purposes of the new effective competition test. The Commission should also retain its interim standards for determining whether LEC-affiliated MVPDs are "offering" video programming services under the new effective competition test. Finally, the Commission should adopt streamlined procedures for effective competition certification.

Respectfully submitted,

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